(1)

91-556

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JANA, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari
To The United States Court Of Appeals For The Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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October 3, 1991

QUESTIONS PRESENTED

1. Whether a contractor's constitutional due process rights are violated by the application of a new, judicially-created irrebuttable presumption that costs were not incurred if certain records documenting the costs are not available for audit.

2. Whether a contractor's inadvertent failure to comply with its record-keeping obligation requires forfeiture of all payments in issue, or whether a contractor may retain all or part of those payments in restitution for its actual past performance.

3. Whether the Government may require repayment of costs based on an untimely audit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner JANA, Inc.[1], prays that a writ of *certiorari* be issued to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

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[1] Petitioner JANA, Inc., owns stock in Hartley Metzner Huenink Communications, Inc. Petitioner has no parent company and no other subsidiaries that are not wholly owned.

Opinions Below

The opinion of the Court of Appeals, reported at 936 F.2d 1265, is reproduced as Appendix A to this petition. The order of the Court of Appeals issued as a mandate is reproduced as Appendix B to this petition. The opinion of the United States Claims Court was rendered in a bench ruling and is reproduced as Appendix C to this petition[2].

Jurisdiction

The judgment of the United States Court of Appeals for the Federal Circuit was entered on June 13, 1991. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed, and by separate orders dated July 9, 1991, and July 30, 1991 (reproduced as Appendices F and G to this petition), the Court of Appeals denied rehearing and declined rehearing *en banc*, respectively. This petition for *certiorari* is filed within 90 days of the order denying rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Regulations Involved

This case involves the effect of Armed Services Procurement Regulation ¶ 7-104.41, 32 C.F.R. § 7-104.41

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[2] The final order and judgment of the United States Claims Court are reproduced as Appendices D and E to this petition, respectively.

(1975) (hereinafter cited as "ASPR")[3], which reads in pertinent part:

> **AUDIT BY DEPARTMENT OF DEFENSE.** (1975 JUN)
>
> (a) *General.* The Contracting Officer or his representatives shall have the audit and inspection rights described in the applicable paragraphs (b), (c) and (d) below.
>
> (b) *Examination of Costs.* If this is a cost reimbursement type, incentive, time and materials, labor hour, or price redeterminable contract, or any combination thereof, the Contractor shall maintain, and the Contracting Officer or his representatives shall have the right to examine books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. Such right of examination shall include inspection at all

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[3] In 1984, the armed services' and other agencies' procurement regulations were replaced with a general Federal Acquisition Regulation ("FAR"), codified at 48 C.F.R. §§ 1-53. The ASPR continues to apply to contracts (such as the ones at issue herein) that came into existence while ASPR was in effect, but the record retention provisions of the new FAR, 48 C.F.R. §§ 4.700-4.706 (1990), contain much language nearly identical to that in ASPR.

reasonable times of the Contractor's plants, or such parts thereof, as may be engaged in the performance of this contract.

. . . .

(e) *Availability*. The materials described in (b) . . . above shall be made available at the office of the Contractor, at all reasonable times, for inspection, audit, or reproduction, until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M of the Armed Services Procurement Regulation, and for such longer period, if any, as is required by applicable statute, or by other clauses of this contract . . . .

The referenced ASPR Appendix M contains the record retention requirements in issue, providing in pertinent part:

M-101 General.

(a) Contractors and Subcontractors are required to retain and make available books, records, documents, and other supporting evidence required to satisfy contract negotiation, administration, and audit requirements of the Department of Defense and the Comptroller General of the United States. These requirements are prescribed by contract clauses.

(b) The general record retention requirements of these contract clauses are subject to the exceptions set forth in this Appendix. The

Appendix identifies these exceptions and prescribes specific retention periods for them.

(1) Records are identified herein primarily in terms of their purpose or use and not by specific name or form number. The descriptive identifications may or may not conform to contractor usage or individual filing practices; but they are to apply to all records kept by the contractor which come within the description, regardless of contractor designations of such records. If two or more of the record categories described are interfiled and screening for disposal is not practical, the contractor or the subcontractor shall retain the entire record series for the longest period prescribed for any of the records.

(2) The prescribed retention periods for the records described in M-201 shall be calculated from the end of the contractor's fiscal year in which an entry is made charging or allocating a cost to a Government contract. Where there is a series of such entries involving a specific record, the retention period for that record shall be calculated from the end of the contractor's fiscal year in which the final entry is made. To apply these retention periods, the contractor or subcontractor should cut off the records in annual blocks and retain for block disposal in accordance with the prescribed retention periods under the related contract or subcontract. An exception to the foregoing starting time for the retention periods shall occur where records generated during a prior contract are relied upon by a

contractor for cost and pricing data in negotiation of a succeeding contract, and the two- and four-year periods will run for those records from the date of the succeeding contract.

. . . .

M-201 Retention Periods. Contractors and subcontractors shall retain the records described in the contract or subcontract records clauses, and shall make them available to the . . . Contracting Officer, or [his] authorized representatives, (i) until expiration of three years after final payment or, for certain records, for the period specified in this paragraph M-201, whichever expires earlier, and (ii) for whatever longer period, if any, is specified in the general requirements of the applicable contract or subcontract records clause.

M-201.1 *Financial and Cost Accounting Records.* Retain for the following periods, calculated as provided in M-101(b)(2):

(i) accounts receivable invoices, adjustments to the accounts, invoice registers, shipping orders, carrier freight bills, or other documents which detail the material or services billed on the related invoices -- RETAIN 4 YEARS.

. . . .

(vi) labor cost distribution cards or equivalent documentation -- RETAIN 2 YEARS.

. . . .

M-201.2 *Pay Administration Records.* Retain for the following periods, calculated as provided in M-101(b)(2):

. . . .

(ii) clock cards or other time and attendance cards -- RETAIN 2 YEARS.

Statement of the Case

This case involves a claim by the Government for repayment of amounts previously invoiced, certified for payment by on-the-scene government representatives, and paid to JANA during performance of two government contracts. These contracts for technical publications were "time and materials" contracts in which payments were to be determined by multiplying the number of hours JANA actually worked by previously-agreed hourly rates.

Payments made during performance were subject to later audit pursuant to the contracts' Audit by Department of Defense clauses, which required the contractor to maintain for certain periods, and to make available for audit, records reflecting all costs claimed to be incurred. These records were to be retained by the contractor for three years from the date of final payment under the contract or any lesser period specified in ASPR Appendix M. Under the contracts' Audit clauses, the Government was permitted (but not required) to audit; however, audit was not a precondition to payment. The contracts do not make the creation or retention of

records a condition precedent to payment or reimbursement.

The Defense Contract Audit Agency performed routine audits more than two years after JANA's completion of work on the contracts and after the end of the fiscal year in which the Navy's last payment was made. The audit reports reflected that the purpose of the audit was "to determine the actual hours worked." The audit reports then stated the auditor's conclusion that there were discrepancies between labor hours submitted on invoices for payment and the "timekeeping documents." Based solely on DCAA's inability to track certain invoiced labor hours back to JANA's timekeeping records, the contracting officer issued a decision finding that JANA had overcharged the Government a total of $563,786 on the two contracts and demanding repayment. Pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, JANA appealed this decision by commencing an action in the United States Claims Court, which considered the matter *de novo*.

JANA's basic timekeeping records were its employee time cards, which recorded all time charged to individual charge numbers and which (as the Government admitted) clearly were required to be retained only two years under ASPR Appendix M-201.1(vi) and M-201.2(ii). Using information taken only from the time cards, JANA also prepared labor recap sheets during performance that listed, for each charge number, all charges for the month. There was no contractual or other requirement to create any document such as these labor recap sheets. Although the DCAA auditor found on a sample basis he could track from the labor recap sheets back to the time cards,

he was unable to track from higher-level intermediate documents (called job control records) and JANA's invoices to the Government back to the labor recap sheets. One issue at trial was the proper classification of the labor recap sheets for the purpose of defining the appropriate record retention period.

JANA presented evidence that the invoice entries in issue had been examined and certified by government representatives before being submitted. It also showed that, while no supporting records at all had been found for some delivery orders, the product required by these delivery orders undisputedly had been shipped and accepted (which evidence tended to show that at least some of the hours claimed indeed had been worked, even if no record of them had been found). Based on this evidence and testimony concerning the function and purpose of the labor records, the trial judge ruled from the bench that the labor recap sheets were labor cost distribution cards or equivalent documents, that the audit had been untimely commenced after the two-year retention period had expired, that supporting records for some costs were lacking but that this lack of support did not prove overpayment, and that, on the record as a whole, the Government had not borne its burden[4] of proving it had made *any* overpayment.

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[4] The trial judge earlier had ruled, in denying cross motions for summary judgment, that the question of overpayment was one of fact and was one on which the Government bore the burden of proof. The Opinion and Order of the United States Claims Court denying

On appeal, the Court of Appeals for the Federal Circuit held that JANA's labor recap sheets were not identical in format to the time cards and, therefore, were not "labor cost distribution cards or equivalent documents," that JANA was obligated to retain the labor recap sheets through the time the audit was performed, and that, since JANA could not produce such records for the audit, "JANA is therefore liable to the Government for overpayment."

Reasons for Granting the Writ

The Court of Appeals' holding permits the Government to recover from JANA every penny of costs alleged to be unsupported by the labor records selected for audit, without regard to what labor hours actually were worked by JANA and without considering the benefit received by the Government from that work. In simple terms, the Court of Appeals created an irrebuttable presumption that, if a contractor cannot produce the type of records later demanded by the Government to support its costs, those costs were not incurred.

As explained below, the appellate court decision misconstrues the contracts' record retention requirements and improperly disregards the trial judge's findings of fact concerning the nature and purpose of the labor records. That portion of the decision, alone, will create confusion in applying the regulations and cause hardship to many contractors.

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summary judgment is reproduced as Appendix H to this petition.

The true evil of the appellate opinion, however, lies with its bland assumption that, if the costs in issue cannot be supported by the particular records the Government requested upon audit, the ultimate question of overpayment is established beyond question or rebuttal. That aspect of the decision below could well have disastrous consequences for many companies, large and small, that have faithfully performed their contracts with the Government but whose records inadvertently may be lost or destroyed before audit. If the Court of Appeals' decision is allowed to stand, contractors can be deprived summarily of their property without any opportunity to rebut the audit findings with other evidence that costs actually were incurred. This Court should exercise its *certiorari* jurisdiction to check the appellate court's foray into substantive rule-making and to restore contractors' faith that their contractual obligations will be no less justly determined when the Government itself is a party to the contract.

I. THE DECISION BELOW CREATES AN IRREBUTTABLE PRESUMPTION THAT IS NOT LOGICALLY COMPELLING AND DOES NOT CARRY OUT THE PAYMENT SCHEME OF THE REGULATION'S PROMULGATORS OR THE INTENT OF THE PARTIES

The Court of Appeals' decision contorts the entire record-keeping and audit scheme of the contracts, as discussed more fully below. Even if the court below were correct in concluding that JANA had a contractual obligation to retain the labor records in issue, there was no suggestion JANA's shortcomings were intentional. The lack of documentation selected for audit should have

been only the beginning of the appeals court's inquiry, rather than its irrevocable end.

There were only three steps in the Court of Appeals' syllogism: (i) the records were required, (ii) they could not be produced, (iii) therefore, there had been an overpayment. Under that decision, a failure to retain records for the specified retention period results in an irrebuttable presumption that the costs were not incurred. No statute, regulation, or clause provides for such a presumption; indeed, the imposition of any presumption flies in the face of the clear language of the regulations.[5] Therefore, this new *judicially*-decreed irrebuttable presumption violates the due process rights of all government contractors and should be carefully scrutinized by this Court under its *certiorari* jurisdiction.

The record-keeping regulations at issue herein do not purport to establish *any* presumption, much less an irrebuttable one. The consequences of a record-keeping lapse are not stated to be automatic forfeiture; to the contrary, the regulations allow for "other supporting

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[5] This Court recognizes, "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). The legislature's or drafter's rationale for creating an irrebuttable presumption has been closely reviewed in decisions of this Court. Surely the intent to create such a presumption should not lightly be read into the naked language of a regulation without either analysis or proof, which is what occurred in the court below.

evidence" to satisfy audit requirements (other than the required "books, records" and "documents"). ASPR Appendix M-101(a). Nevertheless, the Court of Appeals totally ignored the ample "other evidence" of performance that the trial judge considered in his determination that the Government had failed to meet its burden of proof that the contractor was overpaid. As the Claims Court correctly explained:

> [T]he fact that records can't be produced, could be one supporting piece of evidence in a mosaic that spells overpayment. But standing along [sic], and certainly on the facts of this case standing alone, that does not equal overpayment.

(App. C at 19a-20a)

Although the trial judge clearly showed that other evidence presented at the trial controlled his finding, the Court of Appeals improperly ignored the existence of that evidence (and the trial judge's evaluations of oral testimony and witness demeanor) and improperly ignored the trial court's findings without determining they were clearly erroneous. The determination whether a contractor has fully rendered the services for which it has billed is a question of fact. *Government of the Virgin Islands*, ASBCA No. 30648, 88-1 BCA ¶ 20,265 at 102,572; *M & M Services, Inc.*, ASBCA No. 28712, 84-2 BCA ¶ 17,405 at 86,689. The Government bears the burden of proof on that issue (App. C at 17a-18a, 26a, 28a), and the trial court found that burden had not been met. Although it made no ruling the trial court's findings of fact were clearly erroneous, the Court of Appeals, nevertheless, reached the opposite conclusion on

overpayment. *Certiorari* should be granted to review that error alone.

By its failure to allow consideration of the other evidence of incurred costs addressed by the trial court, the Court of Appeals has created out of whole cloth an irrebuttable presumption leading to drastic sanctions for failure (whether justifiable or not) to maintain documentary records.[6] The Court of Appeals' decision that overpayments were made solely because certain records were not retained is clearly erroneous, unreasonable, irrational, and arbitrary.

Even as a limitation imposed by statute, this irrebuttable presumption would fail the "rational basis" test in *Weinberger v. Salfi*, 422 U.S. 749 (1975), to say nothing of the far more stringent requirements of *Vlandis v. Kline*, 412 U.S. 441 (1973). There is no logical link between the loss or untimely destruction of records and the existence or non-existence of underlying costs. The presence of documentation tends to show costs were incurred, but the converse is not true: the loss of documentation says nothing whatsoever about whether

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[6] Suppose, for example, a contractor completes the construction of a building under a cost-reimbursable contract, but a fire at the contractor's offices later destroys all the contractor's records. Under the Court of Appeals' decision, the Government could recoup every penny it had paid (since the contractor had inadvertently breached its record-keeping obligations), notwithstanding the fact that ample "other evidence" (the building itself) demonstrated that enormous material and labor costs had been incurred.

the underlying costs were incurred. As often as not, the irrebuttable linkage of costs and documentation would thwart the parties' intent that the contractor be paid for hours actually worked. Thus, even as a legislative pronouncement, this irrebuttable presumption would lack the critical ingredient of due process found essential in this Court's decisions.

This Court cannot directly examine here, as it did in *Salfi*, whether a test selected by a legislature is rationally related to a legitimate legislative objective, because here we have no such legislative test and no such legislative objective. Here, the irrebuttable presumption of non-incurrence of cost was created by the court below (after making absolutely *no* attempt to discern the intent of the drafters[7]) and imposed under the auspices of the regulations as a condition to payment. *A fortiori*, the non-legislative adoption of such an irrebuttable presumption without demonstrating this was at least intended by the parties[8] offends any notion of due process.

Furthermore, the contracts were written by the Government. The contracts do not require the creation of the labor recap sheets and do not make the creation or retention of records a condition precedent to payment.

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[7] Surely such a draconian intent must be proved rather than inferred. This is not the classic case of judicial deference to legislative choices. Here, the Court of Appeals gave no consideration to whether or not such a legislative (or regulatory) choice ever was made.

[8] The intent of the contracting parties was that the contractor would be paid for labor hours actually worked.

The type of proof that can justify a contractor's billings is, at best, ambiguous (as evidenced by the conflicting judicial conclusions in this case), and contract ambiguities should be construed against the Government under the doctrine of *contra proferentem*. If the Government wishes the absence of a particular record to lead to forfeiture of payment, it should be made to say so clearly and unambiguously.

There is absolutely no basis in the law to support the Court of Appeals' application of an irrebuttable presumption. The court simply leapt to that conclusion. In effect, the Court of Appeals has rewritten the regulations in this area, usurping the Executive Branch's prerogative to fashion its own procurement policies (and the parties' prerogative to fashion their own agreement). The same court charged under the Constitution with ensuring litigants have received due process here has taken a misguided short-cut past due process. In these circumstances, the Court should exercise its discretionary review power to rectify a clear and important departure from its precedents.

II. THE DECISION BELOW WORKED A FORFEITURE BY FAILING TO CONSIDER WHETHER JANA HAD CONFERRED ANY BENEFIT ON THE GOVERNMENT

According to the Court of Appeals, since JANA could not produce the requisite records for audit, "JANA is therefore liable to the government for overpayment." (App. A at 11a) As explained above, the Court of Appeals made no further inquiry into whether costs had been incurred or value conferred on the Government in

connection with the disputed labor. Since benefit *had been* conferred on the Government, however, the court's decision on appeal works an unfair and insupportable forfeiture.

Even if a contractor is not entitled to be paid contractually-specified amounts, the contractor, nevertheless, may be entitled to *some* payment if the Government has benefitted from its performance. For example, in *National League of Cuban American Community-Based Centers*, GSBCA No. 9157-ED, 91-1 BCA ¶ 23,513 at 117,890, the Board of Contract Appeals reasoned that, even if the contractor had breached its record-keeping obligations under a cost-reimbursable contract, "it would nonetheless be entitled to the value of the benefit of its services conferred on the Government."

The purpose of this rule is to avoid payment *forfeitures. Id.*; *Loyal E. Campbell*, GSBCA No. 5954, 82-2 BCA ¶ 15,916 at 78,886, *aff'd on reconsideration*, 82-2 BCA ¶ 16,038 (barring affirmative payment claims by a contractor that "almost defiantly ignored" the contract's record-keeping requirements "would have the effect of working a forfeiture upon appellant, and the law does not so provide"); *see also Harrison Western/Franki Denys*, ENG BCA No. 5577, 90-3 BCA ¶ 22,991 (even where contractor failed to keep complete records reflecting the changed work, Board extrapolated from the portion of the work for which records were available).

In both *Campbell* and *National League*, the Board of Contract Appeals applied the principle of restitution in Restatement (Second) of Contracts § 374(1) (1981):

> "[I]f a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach."

National League, 91-1 BCA at 117,890; *Campbell*, 82-2 BCA at 78,886. This restitution must be measured by the value of performance to the buyer (of which the contract price or rate may be persuasive) rather than the contractor's costs.[9]

Both the Claims Court and the Court of Appeals for the Federal Circuit also apply restitution or similar analysis. Even when payment cannot be made pursuant to contractual payment clauses because of the contract's invalidity, proof in *quantum meruit* or *quantum valebant* will determine the payments to which the contractor is entitled. *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986); *Ocean Technology, Inc. v. United States*, 19 Cl. Ct. 288, 293-94 (1990).

Finders of fact (the boards of contract appeals and Claims Court) on cost issues consistently have held that the failure to obtain or keep required data does not even require that *affirmative* payment claims be forfeited. For example, in a dispute involving the reasonableness of

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[9] Thus, in the building example mentioned in note 6 above, even if the contractor's building costs could not be

claimed costs rather than their incurrence, the Claims Court held that a prime contractor's violation of federal law and procurement regulations in failing to obtain cost or pricing data from its subcontractors for the costs of changed work did not preclude recovery for those costs. *Delco Electronics Corp. v. United States*, 17 Cl. Ct. 302, 324-25 (1989), *aff'd without opinion*, 909 F.2d 1495 (1990). While the failure to obtain data called the "reliability" of the claimed amount into question, the court found there were other "indications of reliability." 17 Cl. Ct. at 325.

In the instant dispute, the trial judge never had to reach the issue of benefit conferred because he found the Government had not borne its burden of proving any overpayment under the contracts' terms. To prevent the complete forfeiture of the amounts in issue, at the very least, the issue of benefit conferred should have been remanded for further consideration by the trial court. This Court should exercise its *certiorari* jurisdiction to ensure the Government does not work improper forfeitures and enrich itself at the expense of its unlucky contractors.

III. THE GOVERNMENT'S AUDIT WAS UNTIMELY AND CANNOT FORM THE BASIS FOR ANY RECOVERY BY THE GOVERNMENT

The Court of Appeals focused on the parties' inability to track from one intermediate labor document (the job control records) to another (the labor recap sheets). In so doing, the court lost sight of the audit's true, sole

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ascertained, the contractor still would be entitled to the value of the building to the Government.

objective: to determine if JANA's underlying labor records supported the incurrence of the hours billed on its invoices. The true audit task was to track hours from JANA's invoices back to the *basic* labor document, JANA's time cards. This entire audit was untimely.

The undisputed testimony showed that JANA's time cards fell under the contracts' two-year, rather than four-year, retention period. The government auditors admittedly commenced their audit several months after that two-year retention period expired. By that time, JANA had no contractual or other duty to keep or retain *any* time cards related to these contracts. As the trial court held, the procuring agency hardly can be heard to complain of the results of an untimely audit, and this audit commenced after the records sought to be audited were no longer required to be kept or produced. Even if the Government's right to make an audit-based claim had not expired altogether, the contractor's failure for any reason to produce auditable labor records under these circumstances cannot constitute a breach by the contractor and is not at all probative of whether the contractor incurred the labor costs in issue.

The auditor chose for his own convenience to concentrate on JANA's labor recap sheets rather than the underlying time cards, claiming that the recap sheets could be tracked back to the time cards and that the real problem was the inability to track from higher-level documents back to the labor recap sheets. That audit decision cannot control the result here. JANA had no contractual or other obligation to create any "labor recap

sheets" or similar documents.[10] It was undisputed that JANA merely transcribed charges from the time cards to the recap, making a total by task rather than by employee. The same steps could have been done on an adding machine tape or scratch notes or could have been recreated later from the time cards (had the time cards themselves still existed or been required to be retained). The labor recap sheets were simply a convenience (one the auditor was unwilling to do without). The audit task, however, was to verify that the time that JANA charged had been *worked*, not that the records of the hours had been retained properly. That task required, ultimately, verification to the time cards,[11] and it was a task that should not have been undertaken after the retention period for time cards expired.

Even focusing on the labor recap sheets, as the Government wished to do, the trial judge found as a matter of fact that their purpose was the distribution of employees' time among various charge numbers and that they were "labor distribution cards or equivalent documentation" subject only to a two-year retention period. This factual finding (which cannot be overturned unless it is found to be clearly erroneous), nevertheless, was ignored by the Court of Appeals.

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[10] JANA would have been in a better position had it never created any labor recap sheets. It then would have been crystal clear that DCAA was attempting an untimely audit of time cards.

[11] The audit reports described the audit findings as the identification of discrepancies between labor hours on the invoices and the "timekeeping documents."

As framed by the Court of Appeals, the issue was whether the labor recap sheets were subject to the two-year retention period for "labor cost distribution cards or equivalent documentation" or the longer period in ASPR Appendix M-201.1(vi), which applies to "accounts receivable invoices, adjustments to the accounts, invoice registers, shipping orders, carrier freight bills, or other documents which detail the material or services billed." Rather than construing the "other documents" in this section to cover only the top level job records detailing invoiced labor cost (which job records the Government admitted could be tracked to the invoices), the Court of Appeals construed "other documents" so broadly as to reach *all* documents supporting *every* type of incurred cost. This construction brings ASPR Appendix M-201.1(i) into direct conflict with ASPR Appendix M-201.1(vi) and 201.2(ii), both of which apply more specifically to basic labor documents and which require retention for only two years. Also, since the labor recap sheets and time cards were not in identical format (i.e., there was not a one-for-one identity of each time card with each labor recap sheet), the appeals court found the labor recap sheets were not "equivalent" to the time cards. This construction effectively substitutes the word "identical" for the word "equivalent" in the paragraph covering "labor cost distribution cards or equivalent documentation." Even as a matter of law, then, the Court of Appeals erred.

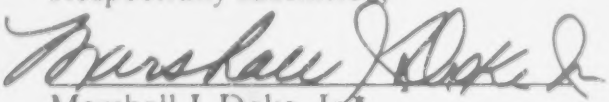
Moreover, under ASPR Appendix M-101(b)(2), the very latest date from which the retention period could run was the end of the fiscal year in which the final entry was made. For individual records, however, the period could commence at the end of earlier fiscal years. In light of

the trial judge's holding that the audit was untimely, he did not have to reach this issue, but the Court of Appeals improperly failed to discriminate among the various records or remand to permit the trial court or the parties to do so. Instead, it concluded erroneously that "the appropriate retention period is thus to be calculated from March 31, 1981." (App. A at 9a) This Court should exercise its discretionary *certiorari* jurisdiction to remedy these errors of the Court of Appeals.

Conclusion

For the reasons set forth above, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,



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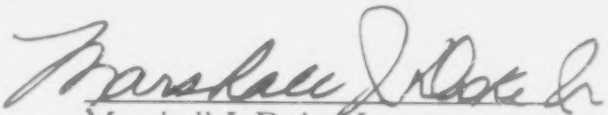
October 3, 1991

CERTIFICATE OF SERVICE

I, Marshall J. Doke, Jr., attorney for Petitioner and a member of the Bar of this Court, certify that on this 3rd day of October, 1991, the foregoing Petition for Certiorari has been served upon defendant by mailing three (3) copies thereof certified mail, postage prepaid, return receipt requested, to Donald E. Kinner, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, Attention: Classification Unit, Second Floor, Todd Building, Washington, D.C. 20530, and by mailing three (3) copies certified mail, postage prepaid, return receipt requested, to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.



Marshall J. Doke, Jr.

APPENDIX

APPENDIX A

United States Court of Appeals for the Federal Circuit

91-5012

JANA, INC.,

Plaintiff- Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

Donald O. Ferguson, Gardner & Ferguson, Inc., of San Antonio, Texas, argued for plaintiff-appellee.

Donald E. Kinner, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellant. With him on the brief were Stuart M. Gerson, Assistant Attorney General, David M. Cohen, Director and Mary Mitchelson, Assistant Director.

Appealed from: U.S. Claims Court

Judge Turner

APPENDIX A

United States Court of Appeals for the Federal Circuit

91-5012

JANA, INC.,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

DECIDED: June 13, 1991

Before RICH, MICHEL, and PLAGER, Circuit Judges.

MICHEL, Circuit Judge.

The United States appeals the judgment of the United States Claims Court holding that JANA, Inc. did not overcharge the government on two contracts, and dismissing the government's counterclaim for repayment. JANA, Inc. v. United States, No. 650-87 C (Cl. Ct. Aug. 23, 1990). Because the Claims Court's construction of the contracts' records retention requirements was incorrect, and because it is uncontested that JANA could not produce records supporting the disputed billings as required by the contracts, we reverse and remand, directing entry of judgment for the government on its counterclaim.

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BACKGROUND

In October 1975, JANA was awarded two technical publication contracts with the United States Navy. These contracts were so-called "time and materials" contracts --that is, the contract price was to be determined largely by multiplying the number of employee hours billed by JANA against fixed hourly rates stated in the contracts. The final contract price was to be determined after the work was completed and, if the government so elected, an audit was performed.

JANA's work on the contracts was completed in late 1980, and the Navy made its last payment in early 1981. Over two years later, in July 1983, the Defense Contract Audit Agency (DCAA) began a routine audit of the contracts, at the request of the Navy. The audit showed large discrepancies between the number of hours for which JANA had billed, and been paid by, the government, and the number of hours actually worked, according to JANA's own time records. The DCAA issued audit reports for both contracts characterizing charges of $343,622 and $220,164, for the unsubstantiated hours on each contract, as overpayments.

Based on the audit reports, the contracting officer issued a final decision in December 1986, finding that JANA had overcharged the government on the two contracts, and demanding repayment. Pursuant to the Contract Disputes Act, JANA contested the contracting officer's decision in the Claims Court. 41 U.S.C. § 609(a) (1988). The government counterclaimed for the alleged overpayments.

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After denying cross-motions by the parties for summary judgment, the Claims Court tried the case and issued an oral bench ruling on August 10, 1990. The court found that the government had proven "beyond a reasonable doubt" that JANA could not produce records substantiating all the invoices it submitted to the government, but nevertheless found, in light of its construction of the contract provisions regarding JANA's duty to retain records, that the government had not proved that JANA had been overpaid. Bench Ruling, Joint Appendix (Jt. App.) at 5, 16. The court therefore entered judgment in favor of JANA. JANA, Inc. v. United States, No. 650-87 C (Cl. Ct. Aug. 23, 1990). The government appeals.

We have jurisdiction over the government's appeal pursuant to 28 U.S.C. § 1295(a)(3)(1988).

DISCUSSION

I

The discrepancy at issue in this case concerns the various types of documents used in JANA's method of recording and billing the time its employees worked on these two government contracts. Each JANA employee filled out "time cards," listing time worked on various jobs. The time each employee recorded for a given job -- such as one of the contracts at issue here -- was then transferred to a "labor recap sheet." The labor recap sheets for each of these contracts thus showed the time each employee spent working on just that contract during a given month. The time recorded on the labor recap sheets was then converted to a dollar value and recorded on the "job control register." Finally, the contents of the

job control register were transferred to the "invoices" sent to the government for payment under each contract.

The DCAA audit of the two contracts at issue here detected that the labor recap sheets listed fewer hours than those reflected in labor costs on the job control register and billed to the government on invoices. In other words, the billings were not fully backed up by information from the labor recap sheets showing that the hours invoiced were actually worked.

It is undisputed, and indeed the trial court found "beyond a reasonable doubt," that neither at the time of trial, nor at the time of the audit, could JANA produce records substantiating all the charges it invoiced under the two contracts. The initial question we must consider is whether this entitles the government to repayment. To determine this, we must look to the interpretation of the contracts at issue.

Both of these time and materials contracts contain a "Submission of Invoices" clause, which provides that the contractor would only be paid for hours that can be substantiated:

> Invoice submissions for payment shall be made based on the actual hours worked . . . . The contractor may be required to justify invoice billings as the Government reserves the right to audit task efforts, employee time cards, etc. Such reviews will normally be conducted by the task ordering officer or, if requested by Naval Air Technical Services Facility, the Defense Contract Audit Agency.

Jt. App. at 98 (emphasis added in part). The contract itself thus put JANA on notice that no payments were final until the contracts had been audited, or the time for auditing had expired, and that at least until then, JANA could be required to produce records substantiating its invoices.

Both of the contracts also contained the "Audit by Department of Defense" clause required by the Armed Services Procurement Regulations (ASPR)[1] in effect at the time the contracts were awarded, providing:

> (a) General. The Contracting Officer or his representatives shall have the audit and inspection rights described in the applicable paragraphs . . . below.
>
> (b) Examination of Costs. If this is a cost reimbursement type, incentive, time and materials, labor hour, or price redeterminable contract, or any combination thereof, the Contractor shall

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[1] The ASPR were subsequently renamed the Defense Acquisition Regulations (DAR). In 1984, the DAR (along with other procurement regulations) were replaced with a general Federal Acquisition Regulation (FAR), codified at 48 C.F.R. §§ 1-53. The records retention provisions of the new FAR, 48 C.F.R. §§ 4.700 - 4.706 (1990), contain much language nearly identical to that in the ASPR. The ASPR and DAR continue to apply to contracts, such as the ones at issue here, which preceded the April 1, 1984 effective date of the FAR. *See* 32 C.F.R. Pts. 1-39, Vol. I at 10 (1989).

maintain, and the Contracting Officer or his representatives shall have the right to examine books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract.

* * * *

(e) Availability. The materials described in (b) . . . above shall be made available at the office of the Contractor, at all reasonable times, for inspection, audit, or reproduction, until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M . . . .

ASPR ¶ 7-104.41, codified at 32 C.F.R. Vol. II (1975) (emphasis added). These contract provisions explicitly required a contractor to retain records verifying the accuracy of invoices to the government. JANA was thus under a specific contractual duty to maintain records supporting the accuracy of its charges for the period specified.

The real issue in this case then is how long JANA was required to maintain records that supported labor charges it invoiced. As specified in ASPR ¶ 7-104.41(e), quoted above, records normally must be maintained for three years unless a shorter period is specified in Appendix M to the ASPR. The government argues that the labor recap sheets are covered under subparagraph (i) of

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Appendix M-201.1, which provides a four year retention period for:

> accounts receivable invoices, adjustments to the accounts, invoice registers, shipping orders, carrier freight bills, or other documents which detail the material or services billed on the related invoices -- RETAIN 4 YEARS.

ASPR Appendix M-201.1(i), codified at 32 C.F.R. Vol. III (1975) (emphasis added).[2] The Claims Court, on the other hand, rejected the government's argument and held that the labor recap sheets were properly classified under subparagraph (vi), which imposes a retention period of only two years:

> labor cost distribution cards or equivalent documentation -- RETAIN 2 YEARS.

ASPR Appendix M-201.1(vi), codified at 32 C.F.R. Vol. III (1975) (emphasis added).[3] In either event, regardless of the applicable period, the ASPR provide that the retention period "shall be calculated from the end of the contactor's fiscal year in which an entry is made charging or allocating cost to a Government contract." ASPR Appendix M-101(b)(2). The last charges to the government under these contracts were in late 1980, and

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[2] The currently applicable FAR contains nearly identical language. See 48 C.F.R. § 4.705-1(a) (1990).

[3] The FAR contains identical language. See 48 C.F.R. § 4.705-1(f) (1990).

JANA's fiscal year ended March 31, 1981. Jt. App. at 6. The appropriate retention period is thus to be calculated from March 31, 1981.

The Claims Court ruled that the "all inclusive language" of M-201.1(i), "which in a generic sense could be describing every check written and every clock card or time record possibly related to the contract," did not include the labor recap sheets at issue in this case. Bench Ruling, Jt. App. at 10-11. Instead, focusing on another provision in the ASPR's records retention requirements, that records "are identified herein primarily in terms of their purpose or use and not by specific name or form number," ASPR Appendix M-101(b)(1), the court found that "there was nothing on the labor recap sheets and the totality of their universe that wasn't also on clock cards, time and attendance cards or employee time cards, whatever we call them, in their total universe," and that "the purpose or use of the labor summary or the labor recap sheet was the distribution of the time spent by employees in collecting it for all employees in one place." Jt. App. at 12. The court therefore reasoned that the labor recap sheets were more properly classified as "labor cost distribution cards or equivalent documentation" under ASPR Appendix M-201.1(vi), the retention period for which is only two years. Jt. App. at 12. The court therefore held that JANA was required to maintain the labor recap sheets only until March 31, 1983, and thus could "have destroyed all of these labor recap sheets, which [are] the only records causing any problem in this case three years [sic, months] before this audit began." Id.

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We disagree with the Claim's Court's construction of the ASPR provisions incorporated into the contracts in this case.

It is undisputed -- indeed, JANA's own president so testified -- that the labor recap sheets do not contain the same information as the employee times cards: Whereas the time cards contain information as to a number of different contracts worked on by one employee for one day, the labor recap sheets collect information for only one delivery order, for one month, for one contract. Jt. App. 262-265. Looking at the documents, as the Claims Court sought to do, "primarily in terms of their purpose or use," ASPR Appendix M-101(b)(1), it is clear that the employee time cards maintained by JANA are "labor cost distribution cards" within the meaning of the ASPR, and that the labor recap sheets do not perform the same function as these "labor cost distribution cards" and therefore should not have been deemed "equivalent documentation" under ASPR Appendix M-201.1(vi). On the other hand, as the Claims Court acknowledged, labor recap sheets do fit within the literal terms of subparagraph (i), "documents which detail the material or services billed on the related invoices." ASPR Appendix M-201.1(i). Moreover, reading subparagraphs (i) and (vi) together suggests the logic behind the distinction between them: While a shorter retention period is imposed on voluminous records, like individual employee time cards, a longer period is required for records of a more summary nature, e.g., the labor recap sheets. We therefore hold that JANA's labor recap sheets are covered by the retention requirement of ASPR Appendix M-201.1(i).

Though the retention period for such materials is specified as four years, ASPR ¶ 7-401.41(e) states that the contractor shall retain records "until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M." See also ASPR Appendix M-201. The shorter time limit of three years thus applies. Calculating from the end of the fiscal year in which the last payment occurred, March 31, 1981, we hold that the contract thus required JANA to maintain the labor recap sheets and other documents supporting the invoices until March 31, 1984.

Properly interpreted, the contracts at issue here provided that payment would only be made for hours which were actually worked and which could be verified on audits. The contracts further required JANA to retain its records supporting its invoices, including labor recap sheets, through the time the DCAA audit was begun in July 1983. It is undisputed that JANA could not produce such records at the start of the audit. JANA is therefore liable to the government for overpayment. There being no factual issues in dispute, a remand for further proceedings is unnecessary, and judgment should be entered in favor of the United States for repayment of the overcharges assessed by the contracting officer.

II

JANA additionally argues, as it did before the Claims Court, that it is entitled to prevail on defenses of laches and estoppel, and that each defense is an alternative and sufficient basis for upholding the judgment of the Claims Court.

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At the outset we note that it is not entirely clear whether the defense of laches may be asserted against the government. See S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 6-9 (Fed. Cir. 1985) (discussing apparently conflicting authority in various circuits and in the Court of Claims, and concluding that "we do not think that the thrust of the decisions is that laches is always inapplicable per se in any contract or other claim where a legal rather than an equitable remedy is sought."). But even if laches is available in some situations as a defense against a government claim for repayment on a contract, this clearly is not such a case. The defense of laches requires a showing of two things: (1) unreasonable and unexcused delay by the claimant, and (2) prejudice to the other party, either economic prejudice or "defense prejudice" -- impairment of the ability to mount a defense due to circumstances such as loss of records, destruction of evidence, or witness unavailability. See Cornetta v. United States, 851 F.2d 1372, 1377-78 (Fed. Cir. 1988) (considering, in banc, the scope of the laches defense, but where it was asserted by the government on a claim for military back pay, rather than, as here, against the government for repayment under a contract).

It is undisputed that the government had no knowledge of any overcharges by JANA, and thus no notice of the basis for its claim of overpayment, until the audit was concluded. That audit was begun within the period JANA was required to maintain records. Thus, assuming without deciding that laches could ever be asserted against the government in a contract case, it is clear that on these facts, the government's delay in conducting the audit, and the resulting delay in the issuance of a

contracting officer's decision assessing the overcharges, were not unreasonable and inexcusable.

It is also not entirely clear whether the defense of estoppel is still available against the government in light of the Supreme Court's decision in OPM v. Richmond, 110 S. Ct. 2465 (1990), which held that, absent fraud by the government, estoppel could never be asserted against it in suits to compel the payment of money from the public treasury in contravention of eligibility requirements contained in an Act of Congress. Public monies are unquestionably involved here, although statutory eligibility requirements are not.

In any event, even if our contract precedent prior to Richmond is still valid, it is clear that the requirements of estoppel were not shown here. That pre-Richmond precedent had held that when estoppel is asserted against the government in the context of a contract dispute, the necessary elements are: (1) the government must know the true facts; (2) the government must intend that its conduct be acted on or must so act that the contractor asserting the estoppel has a right to believe it so intended; (3) the contractor must be ignorant of the true facts; and (4) the contractor must rely on the government's conduct to his injury. American Electronic Laboratories, Inc. v. United States, 774 F.2d 1110, 1113 (Fed. Cir. 1985); Emeco Industries, Inc. v. United States, 485 F.2d 652, 657 (Ct. Cl. 1973).

JANA argues that these requirements were met because it relied on the certifications by the contracting officer's technical representatives (COTR), at the time each invoice was sent, that the work requested was

"satisfactorily performed" and did not expect an audit by DCAA. But it is undisputed that the COTR certifications pertained only to the quality of the work, not to whether the hours billed were correct. Jt. App. 258. And the trial court found, Bench Ruling, Jt. App. 15-16, and there has been no argument that this finding is clearly erroneous, that there was "no question" that the COTR certifications were "not in lieu of an audit." JANA, then, was not entitled to rely on the COTR certifications as verification that the number of hours invoiced were actually worked or that an audit would be foregone. Moreover, the contract itself clearly specified the government's option to audit, and the COTR certifications cannot amend the contract so as to cancel such right of audit. An audit could commence anytime during the period that the records to be audited were required to be kept. Thus, even assuming (without deciding) that estoppel may ever be asserted against the government to defeat its claim for repayment in a suit under the Contract Disputes Act, JANA has not established the requirements of an estoppel defense in this case.

Hence, without deciding whether in a contract case laches or estoppel could be asserted against the government on other facts, we hold that neither is established here. Although these defenses were properly raised below, the Claims Court did not decide them in its bench ruling. Our holding, however, is based entirely on straightforward application of law to undisputed facts and facts properly found, and thus remand for further findings by the Claims Court is not necessary.

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CONCLUSION

The judgment of the Claims Court was based on an erroneous interpretation of the records retention and audit provisions of the contracts at issue. Applying the properly found and undisputed facts to the properly interpreted contracts compels as a matter of law the conclusion that JANA is liable to the government for the overpayments as counterclaimed. Moreover, JANA's alternative defenses of laches and estoppel, even if available, were not established. Accordingly, the judgment of the Claims Court is reversed and the Claims Court is directed to enter judgment, on the plaintiff's claim and on the government's counterclaim, in favor of the United States.

REVERSED AND REMANDED.

COSTS

Each party is to bear its own costs.

APPENDIX B

United States Court of Appeals for the Federal Circuit

91-5012

JANA, INC.,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

Judgment

ON APPEAL from the United States Claims Court

in CASE NO(S). 650-87C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

REVERSED AND REMANDED.

ENTERED BY ORDER OF THE COURT

Dated: Jun 13, 1991 /s/ Francis X. Gindhart, Clerk
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: July 16, 1991

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Bench Ruling by Judge James T. Turner

No. 650-87C August 10, 1990

THE CLERK: All rise. The Court is again in session. Please be seated and come to order.

THE COURT: Good afternoon, ladies and gentlemen. I apologize for the delay. I feel that I am in a position to give my opinion as to which party is entitled to judgment at this time.

It is my opinion that the Plaintiff is entitled to judgment in this case. That is, it is my opinion that the Plaintiff is entitled to a reversal of the contracting officer's final decision that found that there had been an overpayment which JANA was under an obligation to refund.

It is incumbent upon me at this time to state the findings of fact and my conclusions of law which lead me to this conclusion. The ultimate issue in this case is whether there was an overpayment to JANA on either or both of the contracts that are at issue in this case. If that ultimate issue were resolved in the Government's favor, then it would naturally follow a refund of the amount of any overpayment would not only be appropriate, it would be compelled.

With respect to that ultimate issue of whether there was, in fact, an overpayment, on the facts of this case, and the posture of this case, the Government has the burden of proof of establishing its claim of overpayment by a preponderance of the evidence. In every case, some party

has the burden of proof. But in most cases, the fact that one party or another has the burden of proof really isn't the critical determinative factor. There's enough evidence from both sides on all the main factual issues. There's enough law presented on all the legal points that a finder of fact and concluder of law in my position can make the findings and conclusions really without respect to who's got the burden under the evidences out there. There are certain obvious credible issues, and you can make your findings and conclusions.

On the facts in the posture in this case, the conclusion as to who has the burden of proof is well not critical. But just to summarize it, it's uncontested and plain, the Government has the burden, and so my ruling as much as anything else is a ruling that the Government has not discharged the burden of proving by a preponderance of the evidence that there was an overpayment.

Now, it was my intention to dwell for a little bit on the definition of preponderance of the evidence. We don't often get embroiled in the definition of preponderance in Claims Court cases, none of which are tried to a jury and that sort of thing But I'm sure you're all familiar with the fairly standard jury instructions about what preponderance of evidence means.

Among other things, it means that evidence which is most satisfying to a trier of fact, and that which comports most completely with -- those things a rational fact-finder, a rational decision maker would base his decisions on, and to say it a third time, I just find that the Government has not sustained its burden of proof on overpayment. Not that that's any failing on the part of the Government

or certainly not intends any failing on the part of Government counsel. I think the Government just is not in the position of sustaining that burden.

To my way of thinking, the only relevant thing that the Government has proved is that the Plaintiff cannot now produce records which fully substantiate all of the charges it made under both of these contracts, and that it could not produce those records in July of 1983 or in a period shortly after July of 1983 when this audit began.

The Government seems to take the position that proof that -- let me say, the Government has certainly established that, certainly has proven that beyond a reasonable doubt. Now, there's no question here that the Plaintiff is not now and was not in July, 1983 able to produce the records, to display the records which substantiated all of the charges that were reflected on invoices that were submitted and paid.

Now, the Government takes the position, and indeed I'm assuming that it takes the position because it just has to, that that's all they need to prove. That once they prove they can't come up with records, that simply is the same thing as saying there was an overpayment, an overbilling, and a resulting overpayment which must be refunded.

To my way of thinking, that's jumping quite a long way to a conclusion. One does not equal the other. The first, the fact that records can't be produced, could be one supporting piece of evidence in a mosaic that spells overpayment. But standing alone, and certainly on the facts of

this case standing alone, that does not equal overpayment.

We are involved here, of course, with two contracts, and the precise numbers of those contracts are detailed in the complaint and in the Appendix G papers that the parties have filed. The contracts were let. The work started in 1975. The last worked performed under either of the contracts was in September of 1980. Final payment was made under the contracts in January, 1981, and in the next end of fiscal year for this Plaintiff occurred on March 31, 1981.

This audit began in July of 1983, approximately two and a half years after the last payment was received, and approximately two and a quarter years after the end of the Plaintiff's fiscal year, which next followed the end of all work on the contract.

Now, I find it somewhat significant that there was never any suspicion or suggestion of fraud on the part of anybody which resulted in this audit being undetected. The person who contacted the audit, Mr. Harrison, testified that his reason for conducting this audit was just simply the routine that an audit is conducted in all time and materials contract, and that he was, and we all now agree, that two contracts were time and materials contracts. Ergo, an audit was undertaken, albeit two and a quarter years, or let's say two and a half years after the last payment of the contract.

To dwell on this point a little, by no means was the contract undertaken for any reason because anybody had any suspicion that there'd been overbilling. When the

auditor began his inspection, he found perfect correlation between the invoices that were submitted and the job control records that back up those invoices. The loss of the audit trail, so to speak, as Mr. Harrison would use the term, occurred because he could not locate, and then in turn JANA could not locate so called job distribution -- job -- excuse me, labor hour summaries, labor recap sheets that feed into the invoice.

Now, I have several reactions to that problem. Number one, there seems to be some disagreement over whether there had been existing records which were lost, or whether on the other hand, there never had been any records that would reflect -- never had been any labor recap sheets that reflected hours billed on some of the invoices. It is my finding, after reviewing all the facts, that the most likely event is that there were records which were lost.

The problem with the proof on both sides is that both parties were in the position of proving a negative. That's always especially tough. But the -- we are all left to speculate.

The Plaintiff's testimony is to the effect that there were no records, that there was no intentional overbilling. There were records that would support the job control records, which cannot now be produced. It appears to me that that is the more likely explanation.

The problem is, we're all left to speculate on what might have happened to these records. The Plaintiff's own testimony is there was no intentional destruction.

Whether they were entitled to dispose of them or not, they didn't intend to be disposing of any records.

As long as we're speculating, some could have become lost in as many as four moves that the company made after 1978. That there was no testimony on it specifically, there was a high turnover among clerical people. It's something that's just well known that records can get destroyed in that process.

I make no findings about these. I'm opening engaging speculation about what might possibly explain the missing records. But I find that the most likely explanation of what has occurred over the years is that there were records that the Plaintiff could not produce in July of 1983 and shortly thereafter.

All right. Now, we then come to the point of whether they had any obligation to produce them. I thought there was good argument on both sides.

I find under the applicable contract provisions and incorporated regulations, there was no duty on the part of JANA to retain the particular kind of records we're talking about after two years from March 31, 1981, which is to say there was no duty to have maintained them past March 31, 1983, and this audit didn't begin until months after that. To explain that legal conclusion, I would point to Defendant's Exhibits 203 and 204, which are incorporated as parts of regulations.

Defendant's Exhibit 203 is the beginning of Appendix M of a certain regulation, and I call attention to the fact that under M-101 (b) (1) it is said that records in this

appendix, "are identified herein primarily in terms of their purpose or use, and not by specific name or form number." That's end of quote. So we're dealing here with generic terms, and not specific form names.

And then over on DX-204, which is part two of Appendix M, we get into a description of the various kinds of forms and records, and the retention period that's required. And I might clear up one thing. The Government now takes the position that in spite of the retention periods of less than two years and some portions of part two of Appendix M, that the contract really requires a minimum three year retention. I just reject that with some heat.

I think if that's what this contract means, then that's a fraud, because this incorporated provision clearly says that there's some kinds of records one need only retain two years. But then, to get to the nitty gritty of whether the Plaintiff had obligations to retain these labor recap sheets longer than two years, we're of course concentrating on M-201.1 shown on DX-204.

Now, gentlemen, my position hasn't changed from that which I was suggesting I had drifted towards in the final argument. In my view, M-201.1 (i), to the extent that it refers to other documents which detail the material or services billed on the related invoice, means documents similar to the others described in that same provision. And that that all inclusive language, which in a generic sense could be describing every check written and every clock card or time record possibly related to the contract, is not intended to mean that. And as I indicated in argument, I think the mere fact that the items detailed in 2, 3,

4 and 5, which could come under that broad other documents description, if that were the intent, wouldn't even need to be there, because they all have to be retained four years.

Further, I think the labor cost distribution cards or equivalent documentation described in sub item vi matches in a general sense what these labor summaries or labor recap sheets, because I'm mindful of this language back in DX-203, that these records are identified in terms of their purpose of use. The purpose of the labor recap sheets, it seems to me, had to do with the distribution of labor costs. The individual cards filled out by the employees would, as we know from other exhibits in the case, on an individual pertain to a number of contracts, or as the terms were used in the business, a number of charge numbers.

And so to later lead to an invoice, somebody had to extract from each card an individual filled out each day the hours were applicable to a specific contract. And then the function of the labor recap sheets was to collect for a particular month the cost for all employees applicable to a particular charge number, or a particular contract.

Now, again relying on this rubric of identifying a form in terms of its purpose or use, it seems to me that's the purpose or use of the labor summary or the labor recap sheet was the distribution of the time spent by employees in collecting it for all employees in one place. I am persuaded that there was nothing on the labor recap sheets and the totality of their universe that wasn't also on clock

cards, time and attendance cards or employee time cards, whatever we call them, in their total universe.

Now, for all of those reasons, I conclude that what we've been referring to in this litigation is labor recap sheets or the labor summary sheets properly come under this classification of labor cost distribution cards or equivalent documentation, retention period for which is only two years, which naturally leads me to the conclusion that this Plaintiff had the right, could have without violating any contract, provision or regulation, have destroyed all of these labor recap sheets, which the only records causing any problem in this case three years before this audit began. It strikes me as somewhat unfair, then, that the fact that the Government is now relying on the fact that they cannot come up with those records which they had a right to destroy as conclusive proof that there was an overpayment in the case, even though there was a virtual perfect correlation between the job control records, which it should be noted, have on them the very same hours that would have appeared on a labor recap sheet. And there is perfect correlation between those records, which should have those same hours, and the invoices.

All right. Enough said about the regulations. One other thing about those records, when it comes to preponderance of the evidence, part of that definition is what would ring true for a trier of facts. One would one, based on his experience of living likely expect to find. It seems to me that if a contractor was going to engage in intentional overbilling, it would be quite easy to create labor recap sheets that exactly matched the job control records, because all of those are within the control and prepared

by the same people or group of people who might have some incentive to overbill.

The thing that would be tough to falsify, or least the thing that might make it easier to catch somebody falsifying is if they were trying to change the individual time card each employee filled out. They were trying to encourage employees to do a little puffing on their time cards. I say all that just to make the point that even if this Plaintiff had a contractual or regulatory obligation to maintain these labor summary sheets more than two years after March 31, 1981 -- excuse me. The point I meant to make has nothing to do with the retention periods. It's just that if someone in this Plaintiff's position was going to falsify records, it would be quite easy; the same person preparing the labor recap sheets, or, excuse me, the job control record could just manufacture a labor recap sheet and go with it. It just doesn't ring true that you'd have one without the other if there was some falsification involved. The same one that was produced would, could supply all the backup documentation you needed.

All right. Now, another thing I want to emphasize strongly in connection with my conclusion that the Government has not borne its burden of proof in this case that pertains to these COTR certificates. To set the stage for what I want to say, let me just review -- we have a situation where the Government has the burden of proof, and they have proved that Plaintiff cannot now come up with records that would substantiate all its charges. And I would acknowledge that in discharging the burden of proving overpayment, that would be one of the things you want to prove along the way.

But the problem is, they are set over against that belated charge that there was an overpayment, a series of contemporaneous certificates by a contracting officer's technical representatives that all of the hours listed on each separate invoice were "satisfactorily performed." Now, this -- these certificates were required by the contract to be attached before any invoice would be paid.

Mr. Harrision testified that certificates were attached to each of the invoices in order for them to be paid. I'm going to concentrate on the language of the invoices. The contract and its attachments is in the record in PX-105. Page 61 of PX-105 contains that invoicing paragraph that we dwelled on in argument.

That says -- well, that language requires the contractor submit invoices monthly, and it says each such invoice shall be accompanied by certification of performance, and then in parenthesis it said similar to attachment one. That's uncontested in the evidence each invoice was attached by a certificate of performance. Attachment 1 is shown on page 72, and I think it's significant that this is the form which the Government chose to attach to the solicitation, and that required that somebody on behalf of the Government, some representative of the contracting officer, certify "that the hours specified and services described above were satisfactorily performed."

Now, that means that the contracting officer or its representative is having to specify that the hours -- excuse me, to certify, that the hours specified were performed. Not just that they were performed, but they were satisfactorily performed.

The Government counsel takes the position that that's not in lieu of an audit. There's no question about that, there wasn't some substitution for the Government's right to audit. But it means something. It was in there for some reason. It's there so that before the contractor gets a dime on any monthly invoice, somebody from the contracting officer in a position to know is going to certify that the hours were performed, and that went on month after month, invoice after invoice.

What does it mean? In my view, at the very least, when you set that over -- let me back up for a second. Let us assume for the moment that the Government is right, that its proof that the contractor cannot now come up with records is proof of an overpayment. You have set over against that the series of contemporaneous certifications by the contracting officer's technical representative that the hours were performed. It undercuts the Government's case, and it's just one more reason has made it difficult for us to establish proof by a preponderance of the evidence.

Gentlemen, to summarize, I find and conclude that the Government has not sustained its burden of proof of overpayment. Consequently, in my view Plaintiff is entitled to judgment that would reverse the contracting officer's final decision of overpayment. Now, I will be -- well, before I get into the administrative nitty gritty of that judgment, let me inquire of counsel, is there any loose end that I've left untied? Anything I ought to address in the process of rendering an opinion that I have left unaddressed? Anything you can think of, Mr. Kinner?

MR. KINNER: Surely there is, but --

THE COURT: Nothing you can think of right now?

MR. KINNER: No. I think you've covered everything that is not covered in your original summary judgment.

THE COURT: All right. Well, gentlemen, I do not intend for the opinion I just rendered to be the judgment -- to have any time limits running from today. When I return to my office, which won't be until late next week, because I'm leaving to go try another case in Oklahoma City, I will enter a written order which memorializes this, and it will direct entry of judgment, and then any time limits concerning rehearings or appeals would run from the time those papers are entered.

Gentlemen, I have enjoyed dealing with you in this case. I hope we all have other matters together. Is there anything else we should take up before we adjourn today?

MR. KINNER: Nothing from Defendant.

THE COURT: I guess we don't need to be in any hurry to rush outside. I think it's probably 94 degrees by now. Gentlemen, it's a pleasure to have seen you. The Court will be in recess.

(Whereupon, at 12:40 p.m., the hearing in the above-entitled matter was concluded.)

APPENDIX D

In the United States Claims Court

August 23, 1990

No. 650-87 C

JANA, INC.,
Plaintiff,

versus

UNITED STATES OF AMERICA,
Defendant.

FINAL ORDER

Trial of this government contracts case was conducted on August 9 and 10, 1990 in San Antonio, Texas. Based on findings of fact, conclusions of law and related reasoning announced in open court at the conclusion of the trial on August 10 (and which will be contained in a transcript), it is ORDERED that judgment be entered in favor of the plaintiff (1) declaring that plaintiff is not indebted to defendant in any amount in connection with the two final decisions of a contracting officer described in the complaint* and (2) dismissing defendant's counterclaim filed January 29, 1988.

---

* The complaint sought review of two final decisions of a government contracting officer rendered on government claims of overpayment.

APPENDIX D

Pursuant to RUSCC 54(d), costs shall be allowed to the plaintiff ("the prevailing party").

/s/ James T. Turner
James T. Turner
Judge

APPENDIX E

In the United States Claims Court

No. 650-87 C

JANA, INC.

JUDGMENT

v.

THE UNITED STATES

Pursuant to the final order of August 23, 1990,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff is declared not indebted to defendant in any amount in connection with the two final decisions of the contracting officer described in the complaint and defendant's counterclaim is dismissed. Costs to the plaintiff.

Frank T. Peartree

Clerk of Court

August 23, 1990 By: /s/ Linda A. Eddins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Filing fee is $105.00

APPENDIX F

United States Court of Appeals for the Federal Circuit

91-5012

JANA, INC.,

Plaintiff-Appellee,

v.

THE UNITED STATES

Defendant-Appellant.

ORDER

APPENDIX F

ORDER

Before RICH, Circuit Judge, MICHEL, Circuit Judge, PLAGER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on July 16, 1991.

FOR THE COURT,

Dated: July 9, 1991

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

cc: DONALD E. KINNER
DONALD O. FERGUSON

JANA INC V US, 91-5012
(CLM - 650-87C)

****

* NOTE: Pursuant to Fed. Cir. R. 47.8, this order is *
* not citable as precedent. It is a public record. *

****

APPENDIX G

United States Court of Appeals for the Federal Circuit

91-5012

JANA, INC.,

Plaintiff-Appellee,

v.

THE UNITED STATES

Defendant-Appellant.

ORDER

APPENDIX G

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

Dated: July 30, 1991

cc: DONALD E. KINNER
DONALD O. FERGUSON

JANA INC V US, 91-5012
(CLM 650-87C)

****

* NOTE: Pursuant to Fed. Cir. R. 47.8, this order is *
* not citable as precedent. It is a public record. *

****

APPENDIX H

In the United States Claims Court

No. 650-87 C

March 19, 1990

JANA, INC., Plaintiff, versus UNITED STATES OF AMERICA, Defendant.	)	THIS ORDER WILL NOT BE PUBLISHED IN THE U.S. CLAIMS COURT REPORTER BECAUSE IT DOES NOT ADD SIGNIFICANTLY TO THE BODY OF LAW AND IS NOT OF WIDESPREAD INTEREST

Donald O. Ferguson, San Antonio, Texas, for plaintiff.

Donald E. Kinner, with whom were Assistant Attorney General John R. Bolton, David M. Cohen, and Mary Mitchelson, Washington, D.C., for defendant.

OPINION and ORDER

TURNER, Judge.

This case involves alleged overpayments by the government on two contracts with the Navy for publishing services. The plaintiff, Jana, Inc., is a contractor specializing in technical publishing. It entered into two contracts with the Naval Regional Procurement Office to furnish publishing services and related materials required

by the Navy to update technical manuals. On the basis of an audit conducted after completion of the contracts, the contracting officer issued final decisions demanding reimbursement by Jana for alleged overpayments in the amounts of $343,622 and $220,164 on the respective contracts.

This suit constitutes plaintiff's appeal of the contracting officer's decisions pursuant to 41 U.S.C. § 609(a). Defendant has filed a counterclaim seeking reimbursement of the alleged overpayments. The parties have filed cross-motions for summary judgment pursuant to RUSCC 56. Because neither side is entitled to recover as a matter of law and there remain genuine issues of material fact, it is concluded that both summary judgment motions should be denied.

I

Jana is engaged in the business of technical publishing. In 1975 and 1976, Jana entered into two contracts with the Naval Regional Procurement Office to furnish publishing services and related materials required by the Navy to update technical manuals (Contract # N00600-76-0464 dated October 27, 1975 and Contract # N00600-76-D-0596 dated January 30, 1976). Under the terms of these contracts, Jana was required to bill the Navy based on the actual number of hours worked, and the price paid was determined by fixed hourly rates contained in the contracts. Each invoice submitted to the government for payment was "certified" by the appropriate contracting officer or his representative, the contracting officer's technical representative. The certifications stated that the hours specified and services

described in the certifications of performance were satisfactorily performed (Plt. App. 72).*

The two contracts incorporated various provisions of the Armed Services Procurement Regulations, specifically ASPR 7-104.41 and ASPR Appendix M. See 32 C.F.R. vol. II, pt. 1, ¶ 7-104.41 (1979); 32 C.F.R. vol. III, Appendix M (1979). Under these provisions the contracting officer or his representatives had the right to audit and inspect Jana's books, records, documents, physical plants and accounting procedures to verify all direct and indirect costs claimed to have been incurred or anticipated during the performance of these contracts. The regulations also required that the contractor retain various financial records for three years from the date of final payment under each contract or for such lesser time as specified in Appendix M or for a longer period as required by applicable statute or by other clauses of the contract.

---

* The following abbreviations will be used throughout this opinion:
"Plt. App." refers to Plaintiff's Appendix filed June 5, 1989.
"Plt. Resp." refers to Plaintiff's Response to Defendant's Proposed Finding of Uncontroverted Facts, Brief and Motion for Summary Judgment filed June 5, 1989.
"Def. App." refers to the Appendix attached to Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment filed April 28, 1989.
"Plt. Exs." refers to the exhibits attached to Plaintiff's Proposed Findings of Uncontroverted Fact filed April 10, 1989.

APPENDIX H

The final invoice date for contract #0464 was November 1, 1980, and the final invoice date for contract #0586 was October 20, 1980. All entries charging or allocating costs or time related to these contracts were made by Jana prior to March 31, 1981, the last day of a fiscal year. Final payment for these contracts was made on January 20, 1981.

The Defense Contract Audit Agency (DCAA) commenced audits of Jana's time cards and other labor records related to both contracts on July 5, 1983. The method used to conduct the audit involved tracing the hours presented on invoices back through Jana's "labor recap sheets" and "job control records" and correlating these amounts to individual employee time cards whenever possible. The intent of such an audit is to verify the amounts billed with the contractor's labor distribution records (Plt. Resp. 3). In this case, all "job control records" were found so the missing documents which caused the loss of the audit trail include "labor recap sheets" and employee time cards.

The DCAA auditor's review of Jana's records revealed large discrepancies between the hours billed by Jana on its invoices and the actual hours reflected by its labor distribution records. The auditor presented an initial estimate to Jana and requested that it attempt to reconcile the records with the invoices to verify what amount could be supported. Jana was unable to supply documentation to substantiate the apparent discrepancies found by DCAA. The results of Jana's investigation were verified and adopted by the government. They showed that for contract #0464, $343,622 of the labor hour invoices totaling $1,636,629 could not be substantiated by

Jana's records. Similarly, for contract #0596, $220,164 of the labor hour invoices totalling $2,048,255 could not be substantiated.

DCAA issued audit reports for both contracts characterizing the unsubstantiated amounts as overpayments (Def. App. 13-15, 40-42). Based on the audit reports, the contracting officer issued final decisions for both contracts demanding full payment of the unsubstantiated amounts (Plt. Exs. B, C). Jana appealed from these decisions by initiating this civil action.

II

A. Applicable Armed Services Procurement Regulations

The contracts entered into between Jana and the government incorporated provisions of the Armed Services Procurement Regulations. The applicable provisions in this case are ASPR 7-104.41 and ASPR Appendix M. 32 C.F.R. vol. II, pt. 1, ¶ 7-104.41 (1979); 32 C.F.R. vol. III, Appendix M (1979). Under ASPR 7-104.41 the government had the right to conduct an audit of Jana's records. In pertinent part ASPR 7-104.41 states:

> Audit by Department of Defense.
>
> (a) General. The Contracting Officer or his representatives shall have the audit and inspection rights described in the applicable paragraphs (b), (c) and (d) below.
>
> (b) Examination of Costs. If this is a cost reimbursement type, incentive, time and materials,

labor hour, or price redeterminable contract, or any combination thereof, the Contractor shall maintain, and the Contracting Officer or his representatives shall have the right to examine books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. Such right of examination shall include inspection at all reasonable times of the Contractor's plants, or such parts thereof, as may be engaged in the performance of this contract.

* * *

(e) Availability. The material described in (b) . . . above shall be made available at the office of the contractor, at all reasonable times, for inspection, audit, or reproduction, until the expiration of three (3) years from the date of final payment under this contract or such lesser time specified in Appendix M of the Armed Services Procurement Regulation, and for such longer period, if any, as is required by applicable statute, or by other clauses of this contract . . . .

Appendix M of the Regulations contains the records retention requirements. The applicable provisions of Appendix M state:

APPENDIX H

M-101 General.

(a) Contractors and Subcontractors are required to retain and make available books, records, documents, and other supporting evidence required to satisfy contract negotiation, administrations, and audit requirements of the Department of Defense and the Comptroller General of the United States. These requirements are prescribed by contract clauses.

(b) The general record retention requirements of these contract clauses are subject to the exceptions set forth in this Appendix. The Appendix identifies these exceptions and prescribes specific retention periods for them.

(1) Records are identified herein primarily in terms of their purpose or use and not by specific name or form number. The descriptive identifications may or may not conform to contractor usage or individual filing practices; but they are to apply to all records kept by the contractor which come within the description, regardless of contractor designations of such records. If two or more of the record categories described are interfiled and screening for disposal is not practical, the contractor or the subcontractor shall retain the entire record series for the longest period prescribed for any of the records. [Emphasis added.]

(2) The prescribed retention periods for the records described in M-201 shall be calculated from the end of the contractor's fiscal year in

which an entry in made charging or allocating a cost to a Government contract. Where there is a series of such entries involving a specific record, the retention period for that record shall be calculated from the end of the contractor's fiscal year in which the final entry is made. To apply these retention periods, the contractor or subcontractor should cut off the records in annual blocks and retain for block disposal in accordance with the prescribed retention periods under the related contract or subcontract. An exception to the foregoing starting time for the retention periods shall occur where records generated during a prior contract are relied upon by a contractor for cost and pricing data in negotiation of a succeeding contract, and the two- and four-year periods will run for those records from the date of the succeeding contract.

M-201 Retention Periods. Contractors and subcontractors shall retain the records described in the contract or subcontract records clauses, and shall make them available to the . . . Contracting Officer, or their authorized representatives, (i) until expiration of three years after final payment or, for certain records, for the period specified in this paragraph M-201, whichever expires earlier, and (ii) for whatever longer period, if any, is specified in the general requirements of the applicable contract or subcontract records clause.

M-201.1 Financial and Cost Accounting Records. Retain for the following periods, calculated as provided in M-101 (b)(2):

(i) accounts receivable invoices, adjustments to the accounts, invoice registers, shipping orders, carrier freight bills, or other documents which detail the material or services billed on the related invoices - RETAIN 4 YEARS.

* * *

(vi) labor cost distribution cards or equivalent documentation - RETAIN 2 YEARS.

M-201.2 Pay Administration Records. Retain for the following periods, calculated as provided in M-101(b)(2):

* * *

(ii) clock cards or other time and attendance cards - RETAIN 2 YEARS.

On the basis of the foregoing regulations, plaintiff argues that summary judgment should be granted in its favor because it fulfilled its regulatory obligation to retain the records at issue in this case for two years. Under ASPR 7-104.41(e), Jana was required to retain its time and labor cost records for three years from the date of final payment under the contract or such lesser time as specified in Appendix M. Appendix M reduces this three year period to two years for certain records. Section M-201.1(vi) states that labor cost distribution cards or equivalent documentation shall be retained two years. Likewise, M-201.2(ii) states that clock cards or other time and attendance cards shall be retained two years. In addition, M-101(2) states that the retention periods for the records described in M-201 shall be calculated from

the end of the contractor's fiscal year in which an entry is made charging or allocating a cost to a government contract. If there is a series of cost entries involving a particular record, the retention period for that record shall be calculated from the end of the contractor's fiscal year in which the final entry is made.

Since the final invoice date for contract #0464 was November 1, 1980 and the final invoice date for contract #0586 was October 20, 1980, Jana argues that it was not required to retain these records longer than two years after March 31, 1981, the end of its fiscal year. Jana contends that it was only required to retain labor records for these contracts until March 31, 1983, over three months prior to the commencement of the DCAA's audit.

The question remains, however, whether the records which caused the loss of the audit trail in this case may be classified as "labor cost distribution cards or equivalent documentation" or as "clock cards or other time and attendance cards" in order to fall within the two year retention periods of M-201.1(vi) and M-201.2 (ii). The government argues that M-201.1 (i) applies to this case which requires various documents to be retained for four years including "documents which detail the material or services billed on related invoices." In performing its audit, DCAA relied on three types of records: labor recap sheets, job control records and individual employee time cards. It is clear from the face of the regulation that the two year retention period of M-201.2(ii) applies to individual employee time cards. In its response to defendant's proposed findings of uncontroverted fact, the plaintiff states that all "job control records" applicable to these contracts were found (Plt. Resp. 3) and used to

verify the DCAA audit results. The only remaining records used for the audit purposes, therefore, were "labor recap sheets."

Although interpretation of the regulations is a question of law, it remains unclear from a factual standpoint exactly what constitutes a "labor recap sheet" or a "job control record." In its proposed findings of uncontroverted fact, the government states that labor recap sheets and job control records are the documents which detail the services billed on the invoices for these contracts. It argues, therefore, that they should be retained for three years under M-201.1 (i). The defendant measures this three year retention period from the date of final payment for these contracts, January 20, 1981, and argues that Jana was required to retain records detailing services billed on its invoices until January 20, 1984. The plaintiff objects to this proposed finding on the ground that it is a conclusion of law which is incorrect. It argues that labor recap sheets fall within the "equivalent documentation" language of M-201.1 (vi) and need only be retained for two years. Since the parties disagree as to the exact nature of a labor recap sheet and the record contains differing opinions supported by opposing affidavits, it is impossible to rule as a matter of law at this juncture.

In its proposed findings of uncontroverted fact, the government also states that during the audit process Jana produced all the labor distribution records pertaining to these contracts and that they reflected overpayments. Jana objects to defendant's proposed findings of uncontroverted facts and states that the missing portions of its labor distribution records invalidated the audit results. Jana maintains that at this time it is unable to

determine whether it was underpaid or overpaid on these contracts because of the missing records but argues that the performance certifications issued by the contracting officer's technical representatives establish that it worked the hours for which it sought payment from the government. The government argues that even if Jana's objections could be considered disputed facts, they are not material because even if the records were not missing there still would be no correlation between the hours billed on the invoices and Jana's accounting documentation. The court disagrees and finds that there are genuine issues of material fact which prevent disposition of this case on summary judgment at this time. A trial court may exercise discretion in denying summary judgment in certain situations when it is not reasonably certain that there is no triable issue of fact. The court may also postpose a decision until it can be founded on a more complete factual record. Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976). See also Balboa Insur. Co. v. United States, 775 F.2d 1158, 1165 (Fed. Cir. 1985)(summary judgment improper when government has not adequately shown the absence of dispute on all issues of material fact); Mulholland v. United States, 16 Cl. Ct. 252, 267 (1989)(when genuine issues of material fact have not been definitively established by the parties, neither is entitled to summary relief).

In sum, although it is easy to phrase the major issues presented in the cross motions as issues of law, the court simply requires a more complete factual context before characterizing the various labor records and thus identifying the applicable retention periods. Further, a more complete factual context will be necessary to fairly

evaluate plaintiff's justification for any records dispositions which may be found to have been premature.

B. Refined Summary Judgment Standard and Burden of Proof

In this case, the plaintiff moved for summary judgment on an issue for which it would not bear the burden of proof at trial. Jana requested no affirmative monetary relief in its complaint but rather sought to reverse decisions of a contracting officer demanding reimbursement for overpayments. In its answer, the government filed a counterclaim and then a cross-motion for summary judgment alleging that it was entitled to reimbursement for the overpayments as a matter of law. In this situation the government bears the burden of proof on the issue of overpayment. In circumstances where a nonmoving party bears the burden of proof at trial, a refined summary judgment standard has evolved in the case law. Under this refined summary judgment standard, the moving party retains the initial burden of showing that there is no genuine issue of material fact. Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the nonmoving party will bear the burden of proof at trial on a dispositive issue, however, the moving party's burden may be met by showing that there is an absence of evidence to support the nonmoving party's case. Id. at 325. Moreover, the moving party is not required to present affidavits to support its motion regarding issues for which it does not bear the burden of proof at trial but may rely on the pleadings, depositions, answers to interrogatories, and admissions on file. The nonmoving party may oppose the motion with desposition, answers to interrogatories, and admissions on file but may not rely only on the pleadings. Id. at 324.

Since Jana, the moving party, does not bear the burden of proof at trial on the issue of overpayment, its burden on a motion for summary judgment decreases and the government's burden correspondingly increases. In order to prevent the court from granting summary judgment in favor of the moving party, the nonmoving party must produce enough evidence to show that a genuine factual dispute exists or to convince the finder of fact to reasonably find in its favor on the merits of the case. Big Chief Drilling Co. v. United States, 15 Cl. Ct. 295, 299-300 (1988). If the record taken as a whole would not lead a rational trier of fact to find for the nonmoving party on summary judgment, then in an appropriate case the court may determine that there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). On the other hand, if the evidence produced by the nonmoving party shows sufficient disagreement, then the motion for summary judgment should be denied. Big Chief Drilling Co., 15 Cl. Ct. at 300.

In order to determine whether a genuine factual issue exists the essential inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury [or judge] or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). In the present case, the evidence presented is not so one-sided that either Jana or the government must prevail as a matter of law. There is sufficient disagreement to warrant further factual development of the overpayment issue.

III

Accordingly, plaintiff's motion for summary judgment filed April 10, 1989 and defendant's cross-motion for summary judgment filed April 28, 1989 are hereby DENIED. Counsel are requested to confer concerning the time and place for trial and the order of proceedings at trial since it appears from the pleadings and dispositive motions papers that at trial the defendant will bear the burden of proof on the issue of overpayment.

The parties shall file a joint status report not later than April 20, 1990 covering time and place of and order of proceedings at trial.

/s/ James T. Turner
James T. Turner
Judge

No. 91-556

In the Supreme Court of the United States

OCTOBER TERM, 1991

JANA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
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QUESTIONS PRESENTED

1. Whether petitioner, a government contractor, was required to retain for three years its "labor recap sheets" showing labor performed on government contracts, which documents were the basis for payments by the government on the contracts.

2. Whether the government may recoup from petitioner amounts paid for labor claimed to be performed under contract, where a subsequent audit reveals that petitioner failed to comply with a contractual requirement under the Armed Services Procurement Regulations that it retain the labor recap sheets documenting the work performed.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-556

JANA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-15a) is reported at 936 F.2d 1265. The decision of the Claims Court (Pet. App. 17a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on June 13, 1991. A petition for rehearing was denied on July 9, 1991 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on October 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner entered into two contracts with the Navy in 1975 and 1976 to perform work on Navy technical manuals. Pet. App. 37a-38a. The contracts were "time and materials contracts" that determined the contract price primarily by multiplying the number of employee hours worked by the fixed hourly rates specified in the contracts. *Id.* at 3a. Under such a contract, the government does not verify the actual number of hours worked by a contractor until the contract is audited after performance is complete. *Ibid.*; C.A. App. 99-104.

Each contract contained the standard clauses required by the Armed Services Procurement Regulations (ASPR). See ASPR 7-104.41, 32 C.F.R. 7-104.41 (1975). Under ASPR 7-104.41, see 32 C.F.R. § VII, pt. 1, para. 7-104.41 (1975) (the Audit clause), the government is entitled to conduct an audit of a contractor's records, and the contractor is required to maintain "documents * * * sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred * * * for the performance of this contract." [1] The Audit clause

---

[1] The relevant portions of ASPR 7-104.41 provide:

Audit by Department of Defense.

(a) Insert the following clause in all contracts other than contracts entered into by formal advertising which are not expected to exceed $100,000.

AUDIT BY DEPARTMENT OF DEFENSE (1975 JUN)

(a) *General.* The Contracting Officer or his representatives shall have the audit and inspection rights described in the applicable paragraphs (b), (c) and (d) below.

(b) *Examination of Costs.* If this is a cost reimbursement type, incentive, time and materials, labor hour, or price redeterminable contract, or any combination thereof,

also required petitioner to maintain these documents "until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M of the [ASPR]." *Ibid.*

As described by the court of appeals, petitioner's accounting system consisted of four basic documents:

> Each JANA employee filled out "time cards," listing time worked on various jobs. The time each employee recorded for a given job—such as one of the contracts at issue here—was then transferred to a "labor recap sheet." The labor recap sheets for each of these contracts thus showed the time each employee spent working on just that contract during a given month. The time recorded on the labor recap sheets was then converted to a dollar value and recorded on the "job control register." Finally, the contents of the job control register were transferred to the "invoices" sent to the government for payment under each contract.

---

the Contractor shall maintain, and the Contracting Officer or his representatives shall have the right to examine books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. * * *.

* * * * *

(e) *Availability.* The materials described in (b), (c) and (d) above shall be made available at the office of the Contractor, at all reasonable times, for inspection, audit, or reproduction, until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M of the Armed Services Procurement Regulation, and for such longer period, if any, as is required by applicable statute, or by other clauses of this contract, or by (1) and (2) below * * *.

Pet. App. 4a-5a. The technical representative of the contracting officer provided a certification with each invoice that the hours recorded and the services described were satisfactorily performed. *Id.* at 38a-39a. It is undisputed, however, that these certifications pertained only to the quality of the work, not to whether the hours billed were correct. *Id.* at 14a; C.A. App. 30.

Petitioner submitted invoices for labor on the two Navy contracts totalling $3,684,884. Pet. App. 40a-41a. The government made final payment under the contracts on January 20, 1981. *Id.* at 40a. On July 5, 1983, the Defense Contract Audit Agency (DCAA) commenced an audit of both contracts. *Ibid.* The audit revealed that the hours stated on petitioner's job control register and invoices exceeded the hours shown on the labor recap sheets and time cards made available to the auditors. *Id.* at 5a. Petitioner's records accordingly failed to substantiate $563,786 of its invoice charges for labor. *Id.* at 40a-41a. DCAA's audit reported the $563,786 as an overpayment, and the contracting officer requested that petitioner repay this amount. *Id.* at 41a.

2. Petitioner sought review of the DCAA's decision under the Contract Disputes Act of 1978, 41 U.S.C 609(a), by filing this action in the Claims Court. The government counterclaimed for the $563,786. Pet. App. 38a. The Claims Court entered judgment for petitioner. *Id.* at 30a-31a. It found that petitioner "is not now and was not in July 1983 [when the audit began] able to produce the records * * * which substantiated all of the charges that were reflected on invoices that were submitted and paid." *Id.* at 19a. Nevertheless, the court held that the gov-

ernment had not met its burden of proving that an overpayment had occurred. *Id.* at 17a-18a. Without making a definitive finding on this point, the court speculated that "most likely" these records had been lost. *Id.* at 21a-22a. Relying on ASPR App. M-101(b)(2), 32 C.F.R. App. M-101(b)(2) (1979), the court held that petitioner was under no obligation to retain the labor recap sheets until the July 1983 date when the government's audit began, but only until March 31, 1983, two years after the end of petitioner's fiscal year in which its final charges under the contracts had been made.[2] Pet. App. 22a, 40a. The court based that holding upon its legal conclusion that petitioner's "labor recap sheets" are "labor cost distribution cards or equivalent documentation," which the regulations require to be retained only for two years, rather than "documents which detail the material or services billed on the related invoices"—which must be retained for at least three years. *Id.* at 24a; see note 5, *infra*; ASPR App. M-201.1(i) and (vi), 32 C.F.R. App. M-201.1(i) and (vi).[3]

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[2] Petitioner was also unable to produce employee time cards to substantiate payments under the contracts. Pet. App. 40a. It is undisputed (Pet. 8), however, that the required retention period for these records is two years. ASPR App. M-201.1(vi), M-201.2(ii), 32 C.F.R. App. M-201.1(vi), M-201.2(ii) (1979).

[3] The relevant portion of that regulation provides:

M-201.1 *Financial and Cost Accounting Records.* Retain for the following periods, calculated as provided in M-101(b)(2):

(i) accounts receivable invoices, adjustments to the accounts, invoice registers, shipping orders, carrier freight bills, or other documents which detail the

3. The Federal Circuit reversed and directed entry of judgment for the government. Pet. App. 1a-15a. The court of appeals first found that the "Submission of Invoices" clause in each contract provided that petitioner "would only be paid for hours that can be substantiated." The court explained that those clauses "put [petitioner] on notice that no payments were final until the contracts had been audited, or the time for auditing had expired, and that at least until then, [petitioner] could be required to produce records substantiating its invoices." *Id.* at 5a, 6a.[4] Relying upon the Audit clause included in each contract (see pp. 2-3, note 1, *supra*), the court of appeals held that petitioner "was thus under a specific contractual duty to maintain records supporting the accuracy of its charges for the period specified." Pet. App. 7a.

The Federal Circuit also ruled, contrary to the Claims Court's holding, that the labor recap sheets were not "labor cost distribution cards or equivalent documentation" required to be retained for two years under ASPR App. M-201.1(vi). Pet. App. 10a. That category applied to the employee time cards, and the

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material or services billed on the related invoices—RETAIN 4 YEARS.

* * * * *

(vi) labor cost distribution cards or equivalent documentation—RETAIN 2 YEARS.

[4] The "Submission of Invoices" clause provides:

Invoice submissions for payment shall be made based on the actual hours worked. * * * The contractor may be required to justify invoice billings as the Government reserves the right to audit task efforts, employee time cards, etc. * * *.

See Pet. App. 5a.

labor recap sheets contained different information and had a different function than the time cards, the court observed. *Ibid.* The labor recap sheets were held to "fit within the literal terms of [ASPR App. M-201.1(i), that is,] 'documents which detail the material or services billed on the related invoices,'" *ibid.*, which are required to be retained for three years.[5] The court also observed that a longer retention period for the labor recap sheets was warranted because they were less voluminous, and thus easier to store, than the employee time cards. *Ibid.*

The court of appeals concluded that the audits by the DCAA were conducted within the three-year period in which petitioner was required to retain the labor recap sheets supporting the invoices it submitted to the government. Pet. App. 11a. It found that, despite this obligation, petitioner was unable to produce records that supported all the payments made by the government. *Ibid.* Therefore, the court concluded, petitioner was liable to the government for an overpayment representing the undocumented labor charges. *Ibid.*[6]

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[5] Although Appendix M-201.1(i) specifies a retention period of four years for these documents, the court noted (Pet. App. 11a) that ASPR 7-401.41(e) and the Audit clause reduce that period to three years by providing that records shall be retained "until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M."

[6] The Federal Circuit also rejected petitioner's claims of laches and estoppel. Pet. App. 11a-14a. Petitioner does not challenge those holdings in this Court.

ARGUMENT

Congress has conferred exclusive jurisdiction upon the Federal Circuit to review disputes arising under the Contract Disputes Act of 1978, 41 U.S.C. 607(g),[7] thereby establishing it as the specialized and expert tribunal to resolve such issues. The Federal Circuit's resolution of the issues presented by petitioner rests upon a straightforward application of standard contract clauses, required by the ASPR,[8] to the undisputed facts of this case. The court of appeals correctly decided this case, and no further review is warranted.

1. In holding that petitioner was required to retain its labor recap sheets for three, not two, years, the court of appeals correctly interpreted the regulations describing the periods for which records must be retained on government contracts. As the court recognized, the labor recap sheets represent a collation of the hours worked by petitioner's employees on each government contract—data that the contractor converted to a dollar value and transferred to the "invoices" sent to the government for payment. Pet. App. 4a-5a. The recap sheets therefore fall within the category of "documents which detail the material or services billed on the related invoices," see ASPR App. M-201.1(i), which must be retained for three

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[7] The sole exception to this grant of jurisdiction provides that decisions of the Tennessee Valley Authority board of contract appeals are reviewable in the district courts. 41 U.S.C. 607(g)(2).

[8] The ASPR provisions applicable here were superseded in 1984 by substantially identical provisions of the Federal Acquisition Regulation (FAR), 48 C.F.R. 4.700-4.706. The ASPR regulations continue to apply to contracts entered into before the FAR became effective. See Pet. App. 6a.

years. Petitioner points to no authority supporting its contention that the court misclassified these documents under the pertinent contract regulations. That issue does not merit this Court's attention.[9]

2. The court of appeals was also correct to hold that, under the Submission of Invoices clause (see p. 6, note 4, *supra*), petitioner was entitled to be paid for time-and-materials contracts "based on the actual hours worked." Pet. App. 5a. The clause also states that "[t]he contractor may be required to justify invoice billings as the Government reserves the right to audit task efforts, employee time cards, etc." *Ibid.* The Audit clause expressly requires the contractor to maintain its accounting records for the prescribed period. As the court of appeals concluded, the language of the contract clauses, taken together, obligates the government to pay only "for hours which were actually worked and which could be verified on audits." *Id.* at 11a. It is undisputed that, when audited within the three-year period, petitioner could justify only $3,121,098 of its $3,684,884 invoice bill-

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[9] Petitioner implies that the government is, in effect, attempting to extend the two-year retention requirement for time cards to three years based on petitioner's wholly voluntary decision to collate the time card data on labor recap sheets, rather than to rely on time cards alone. Pet. 21 n.10. This argument is unavailing. Although neither the contract nor the regulations stipulate the form in which records must be kept, they do set forth the period for which a contractor is required to retain the types of records it generates. Petitioner elected to keep records of time worked on government contracts in the form of labor recap sheets—records for which the retention period under the contract is three years. Petitioner's failure to retain the sheets documenting all charges constituted a breach of the contract requirement that it retain such records, making it liable to the government for the overpayment of undocumented charges.

ings. *Id.* at 40a-41a. Petitioner was accordingly liable to the government for the $563,786 overpayment that was not supported by petitioner's records.

3. Contrary to petitioner's argument (Pet. 11-16), the court below did not create an irrebutable presumption that petitioner failed to incur labor costs not reflected in its records. Rather, the court held only that the contracts did not entitle petitioner to retain payments for the portion of labor costs that it could not support by adequate documentation, regardless of whether those costs were incurred. In this regard, the case is analogous to *United States* v. *Locke*, 471 U.S. 84 (1985), where this Court reversed a lower court's holding that a failure to comply with a mining claim filing requirement constituted an invalid irrebuttable presumption that the claimant intended to abandon its claim. Rejecting that analysis, this Court held that enforcement of the applicable filing requirement "presume[d] nothing about a claimant's actual intent," but, instead, simply meant that all claims that were not timely refiled were forfeited. 471 U.S. at 103. Similarly, here, the court of appeals made no presumption or finding regarding petitioner's actual costs. Rather, it held that the express terms of the contracts obligated the government to pay only for billings backed up by records that petitioner had agreed to retain.

4. Petitioner contends (Pet. 16-19) that the court of appeals worked an unlawful forfeiture in not permitting petitioner to show that it actually incurred costs and conferred benefits upon the government in excess of the amount it could substantiate with records made available to the auditor. There was no "forfeiture" here, however, because the contract between the parties conditioned payment on the govern-

ment's ability to verify costs through an audit of required records.

The cases on which petitioner relies (Pet. 16-19) are not to the contrary. The express payment provisions of the time and materials contracts at issue here distinguish this case from all but one of the cases petitioner cites, in which *quantum meruit* recovery was allowed despite the invalidity of a contract or a contractor's record-keeping failures. See *United States* v. *Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986) (*quantum meruit* recovery allowed where contract invalid); *Ocean Technology, Inc.* v. *United States*, 19 Cl. Ct. 288 (1990) (same); *Delco Electronics Corp.* v. *United States*, 17 Cl. Ct. 302 (1989) (reasonable equitable adjustment permitted for change in contract), aff'd without opinion, 909 F.2d 1495 (Fed. Cir. 1990); *National League of Cuban American Community-Based Centers*, GSBCA No. 9157-ED, 91-1 B.C.A. (CCH) ¶ 23,513 (1990) (*quantum meruit* allowed under cost-reimbursable contract where government instructed contractor to destroy records); *Harrison Western Franki Denys*, ENG BCA No. 5577, 90-3 B.C.A. (CCH) ¶ 22,991 (1990) (reasonable adjustment based upon extrapolation from available records allowed for change in fixed-price contract).

The remaining case cited by petitioner, *Loyal E. Campbell*, GSBCA No. 5954, 82-2 B.C.A. (CCH) ¶ 15,916, aff'd on reconsideration, 82-2 B.C.A. (CCH) ¶ 16,038 (1982), is fully consistent with the decision below. In that case, the contractor's faulty record-keeping prevented it from substantiating any of its $70,148 invoices, but the government auditor calculated that only $17,304 of the billings had been excessive, and the government sought to recover only

that amount. The Board of Contract Appeals held that initial payments to a contractor under a time and materials contract are provisional and subject to recapture if the contractor cannot substantiate its invoices with the records required by the contract. Although the Board made clear that the breach of the record-keeping requirements excused the government from making *any* unsubstantiated payment under the contract, it allowed the contractor to retain the amount that the auditor had determined was not excessive as restitution for the benefit that the contractor had conferred upon the government. The Board held, however, that the contractor was estopped by its record-keeping breach from arguing, as petitioner would argue in this case, that it actually worked all of the hours billed on its invoices.

This case is unlike *Campbell* in two important respects: first, petitioner here lacked record verification for only a small portion of its putative labor costs, and thus did not stand to lose all payment under the contract as a result of its breach. More importantly, however, the government auditor here did not determine, as did the auditor in *Campbell*, that labor costs unsupported by required records were actually incurred, nor did the government agree to excuse repayment of certain costs. On the facts of the instant case, the Board's decision in *Campbell* actually supports the result below in making clear that a contractor's breach of its record-keeping obligations prevents it from contesting the amount of the overpayment determined by a government audit.

Finally, even conceding that a time and materials contractor might be entitled to restitution for a benefit to the government in the absence of required records, and that the contractor would be permitted to

prove the amount of benefit by extrinsic evidence, the decision below is still correct. Petitioner presented no evidence, and neither court below found, that its employees actually performed the work underlying the unsubstantiated labor charges to the government. Indeed, petitioner now seeks a remand to attempt to make such a showing. Pet. 19. Petitioner had a full opportunity at trial to prove that the costs for which it obtained reimbursement were actually incurred. Having failed to do so, it is entitled to no further relief.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 91-556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JANA, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari To The United States Court Of Appeals For The Federal Circuit

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a contractor's constitutional due process rights are violated by the application of a new, judicially-created irrebuttable presumption that costs were not incurred if certain records documenting the costs are not available for audit.

2. Whether a contractor's inadvertent failure to comply with its record-keeping obligation requires forfeiture of all payments in issue, or whether a contractor may retain all or part of those payments in restitution for its actual past performance.

3. Whether the Government may require repayment of costs based on an untimely audit.

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REPLY TO BRIEF IN OPPOSITION

Statement of the Case

Without endorsing other aspects of the Brief for the United States in Opposition ("Resp. Br."), Petitioner JANA, Inc.[1], submits this Reply to Brief in Opposition

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[1] Petitioner JANA, Inc., owns stock in Hartley Metzner Huenink Communications, Inc. Petitioner has no parent company and no other subsidiaries that are not wholly owned.

solely to correct one misstatement of fact in the Respondent's Statement and two erroneous or misleading statements in Respondent's Argument. The misstatement in Respondent's Statement is addressed in this Statement of the Case; the other two misstatements are addressed in the Argument below.

Respondent's Statement described the certifications made by the Contracting Officer's Technical Representatives ("COTRs"). Resp. Br. at 4. Respondent then stated, "It is undisputed, however, that these certifications pertained only to the quality of the work, not to whether the hours billed were correct." *Ibid.* In fact, the significance of the COTRs' certification has been hotly contested at every stage of the proceedings in this case, and findings of fact favorable to Petitioner were made by the trial court in its role as finder of fact. Respondent's statement seriously distorts the record and, if uncorrected, could mislead this Court.

Prior to the Government's payment of each invoice under these contracts, the cognizant COTRs certified "that the hours specified and services described above were satisfactorily performed." Pet. App. 27a. JANA claimed (on motion for summary judgment and at trial) that the missing business records in issue here, ten years old at the time of its summary judgment motion, already had been reviewed by the COTRs at the time of the COTRs' contemporaneous certification of JANA's invoices. C.A. App. 259-60.

The Claims Court's opinion denying summary judgment reflected the existence (although, naturally, not the resolution) of this dispute. The trial judge described

JANA's argument "that the performance certifications issued by the contracting officer's technical representative establish that it worked the hours for which it sought payment from the Government." Pet. App. 48a.

At the trial, the judge resolved this issue in JANA's favor. Evidence was presented that JANA's documentation was contemporaneously reviewed by the COTRs. C.A. App. 257, 259-60. In his bench opinion, the trial judge "emphasized strongly" that "the Government [had] not borne its burden of proof in this case that pertains to these COTR certificates." The judge further stated:

> Now, that means that the contracting officer or its representative is having to specify that the hours -- excuse me, to certify, that the hours specified were performed. Not just that they were performed, but they were satisfactorily performed.

Pet. App. 27a. While conceding the certificates were not "in lieu of an audit," the trial judge nevertheless went on to find:

> But it means something. It was in there for some reason. It's there so that before the contractor gets a dime on any monthly invoice, somebody from the contracting officer in a position to know is going to certify that the hours were performed, and that went on month after month, invoice after invoice.

Pet. App. 28a.

The only things that should be "undisputed" about the COTRs certifications are that (i) the trial judge found,

after trial, the certifications *did* address the actual hours worked, and (ii) they were one of the factors persuading the judge that there had been no overpayment.

Summary of Argument

This Reply to Brief in Opposition is submitted only to address erroneous and misleading statements in Respondent's Brief. One of these statements, concerning the COTRs' certifications, was in Respondent's Statement and is discussed above. Respondent also alleged that JANA had an opportunity at trial to prove that the costs in issue were actually incurred but failed to do so. Resp. Br. at 13. This statement completely contradicts the trial court's findings and conclusions and, as shown below, ignores the central issue in the trial. Finally, Respondent attempted to distinguish several cases cited by Petitioner in support of a *quantum meruit* recovery on the basis that different contractual payment provisions were involved. That attempt mischaracterizes or misapprehends the theory of recovery in *quantum meruit*, which (to avoid forfeitures) permits recovery for the benefit conferred even if payment is excused under the contract.

Argument

I. THE TRIAL COURT HELD THERE WAS NO OVERPAYMENT BASED ON EVIDENCE THAT, DESPITE THE LACK OF SUBSTANTIATING DOCUMENTS, THE DISPUTED HOURS WERE WORKED

Respondent argues that JANA had full opportunity at trial to prove the disputed costs were incurred but failed to do so. Resp. Br. at 13. That statement reflects a misunderstanding of the nature of the proceeding below.

The issue addressed at trial was, simply, whether there had been any overpayment. Pet. App. 17a. The case involved the record-retention regulation, ASPR App. M, but it was not *about* that, or any other, regulation. As is clear from the trial judge's bench ruling, the issue at trial was whether JANA had worked the hours for which it had been paid. If not, the trial judge believed the Government clearly was entitled to a refund. *Ibid.* This was a question of fact for the trial judge. Although the Government tried to focus attention on the record-keeping regulation and make it a controlling question of law (Pet. App. 19a), the trial judge disagreed. The issue *he* addressed was overpayment, not substantiation.

The trial judge examined a "mosaic" of facts (Pet. App. 19a) on the issue of whether the disputed hours were worked. He explained that the burden of proof was on the Government to show the hours had not been worked since the Government was making an affirmative claim of overpayment. Pet. App. 17a-18a. On the evidence, he found the Government had not met that

burden. Pet. App. 18, 28a. One of the factors that influenced him was the COTRs' certifications, which he viewed as evidence that "the hours were performed." Pet. App. 28a.

The Government clearly viewed the key issue as being the duty to substantiate, and it may have perceived all the other evidence as a distraction or a waste of time. The trial judge, clearly, did not agree. JANA presented (*inter alia*) evidence that its records had been reviewed by the COTRs at the time of their certifications (C.A. App. 259-60), and that some delivery order items for which *no* substantiating records could be found at the time of audit had, nevertheless, been produced and accepted (C.A. App. 233-34). The fact these items were accepted is, by itself, enough to prove that at least some of the costs in issue here are for hours that *must have been* worked.

Because of his findings that there had been no overpayment, the trial judge made no attempt to quantify the benefit conferred on the Government. Pet. 19. Respondent may be confusing this lack of quantification of benefit with the question of whether the work was performed. As explained above, the trial court believed that it had been (or, at least, that the Government failed to prove by a preponderance that the underlying work had not been performed).

II. RESPONDENT'S ATTEMPT TO DISTINGUISH THE *QUANTUM MERUIT* CASES ON THE BASIS OF THE EXACT PAYMENT PROVISIONS ALLEGEDLY VIOLATED REFLECTS ITS MISAPPREHENSION OF THE NATURE OF THE RESTITUTION REMEDY

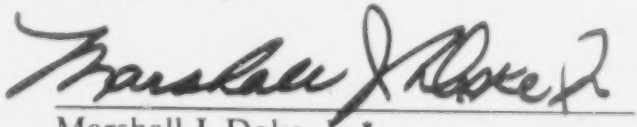
One other statement in Respondent's Brief in Opposition, while not a mischaracterization of the record, still is confusing and deserves brief mention. Respondent claims that the "express payment provisions of the time and materials contracts at issue here distinguish this case from all but one of the cases petitioner cites, in which *quantum meruit* recovery was allowed despite the invalidity of a contract or a contractor's record-keeping failures." Resp. Br. at 11. It is true that the cases Respondent mentions may not involve the precise record-keeping provisions in issue here. They were cited, however, as examples of payment in *quantum meruit* when, *for whatever reason*, payment could not be made under the contract. *E.g., United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986) (in *quantum meruit* recovery, the contractor "is not compensated under the contract, but rather under an implied-in-fact contract"); *Ocean Technology, Inc. v. United States*, 19 Cl. Ct. 288, 294 (1990) (quoting *Amdahl* for the identical proposition); *National League of Cuban American Community-Based Centers*, GSBCA No. 9157-ED, 91-1 BCA ¶ 23,513 at 117,890 (accepting, *arguendo*, the Government's assertion that the contractor's breach of record-keeping requirements excused the Government's payment obligations, only the *contractual* payment obligations would be excused, not the contractor's common-law right to restitution for benefit conferred).

Respondent focuses on the express payment provisions of the contracts in issue here and argues these provisions distinguish the cited cases from the case at bar. This "distinction" is meaningless. Even if the court below properly found that JANA is not entitled to any payment under the contract because of these "express payment provisions," the issue then would be whether JANA conferred a benefit on the Government for which it should be compensated, as in the cases purportedly distinguished by Respondent.

Conclusion

For the reasons set forth above and in the Petition for Writ of Certiorari, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,



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